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A Declaratory Judgment for Procedure

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Letters of Interest

A Declaratory Judgment for Procedure

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

The writer has made the suggestion to the Advisory Committee on Rules for Civil Procedure charged with drafting the proposed new Federal Rules that those rules should include a provision for a declaratory judgment as to procedure. The substance of such a provision would permit any party to request a ruling from the judge as to the proper procedure to be followed in the case then pending. After notice to other interested parties (unless the question involved was one as to the issuance or service of process, where the matter would have to be decided *ex parte*) the judge should enter an order prescribing a rule for the situation presented, which would be reviewable on appeal only where an outrageous result was reached and a party deprived of some substantial benefit to which he was clearly entitled.

The necessity for such a provision in a new code of procedure, which to a great many lawyers will constitute a wide departure from a familiar procedure, appears obvious. Its desirability in any code of procedure seems demonstrable.

A new code is bound to be ambiguous and its exact meaning in the course of its administration will be subject to controversy. There is every reason why such controversy should be definitely settled during the pleading stage of the proceeding. It is true that the proposed rules seek to minimize the effect of procedural errors, and to give the trial judge power to compel compliance with the rules there announced. Those provisions, however, relate always to an attempted administration of the rules therein promulgated. Over and above those rules the trial court should have the power in case of doubt, or in a case where the situation is not covered by one of the rules promulgated by the Supreme Court, to make a rule for the case at hand which would not be a purported administration of any of the promulgated rules.

It will, of course, be found that situations will develop where no rule is provided. The Supreme Court when such defect is found may well take care of the situation by an amendment to the adopted rules. In the meantime the trial courts should be given express power to deal with such a situation in the manner suggested and thus avoid a great deal of prolonged litigation over strictly procedural matters.

The proposed rules are purposely stated in broad terms. Language being what it is there will at the beginning at least be considerable controversy as to its exact meaning. Power to define the terms used for the purposes of a pending case should be given the trial courts, not as an administration of the rules, but as a power to prescribe a rule for the case at hand.

Where the rule is in terms broad, but intelligible, its specific application will cause difficulty. For example, proposed rule 13 (b) provides for the pleading of "affirmative defenses." In the cases of contract and statutory rights this presumably continues the distinctions between a condition precedent and a condition subsequent, between limitations and an exception or a proviso. Before the case is disposed of the trial court will be called upon to rule whether the situation presented involves one or the other. A plaintiff or a defendant must now take chances on what that ruling will be when the question is raised during the trial. There is every reason why some method should be provided whereby such questions, and other similar ones, can be finally settled before trial.

The same considerations which support a declaratory judgment as to substantive rights support a declaratory judgment as to procedure.

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The Soviet Constitution on Paper and in Reality

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

The article commencing on page 589 of the September issue of the JOURNAL in relation to the projected Soviet Constitution, is another instance of the publication of a half truth and leads an uninformed reader to believe that the majority of the citizens of the Soviet Union must be perfectly happy and satisfied with a centrally dictated government: social, political and economic. The fact that the control of the Communist Party is such that free expression of the will of the people is constitutionally impossible, is not made clear. Either the Constitution as published in the *New York Times* was a distorted or incomplete translation, or the review in the JOURNAL was hurriedly written, otherwise it certainly would not have extolled the document as being "noteworthy for the civil liberties which it guarantees and the universal suffrage which it provides."

One aspect of civil liberty is the freedom of the people to join together in political organizations. By clause 126 of the projected constitution, legality of political organization is limited to the Communist Party, and it is further reserved to the members of the Party to control all executive positions in state employment, as well as in the trade-unions, cooperative societies, and other public or semi-public organizations. Furthermore, the type of club or semi-public organization which can be formed by the people, is regulated by the Constitution. Clause 126 provides:

"For the benefit of the working masses and to induce the mass of the people to organize themselves and to take part in political activities, the citizens of the USSR are granted the right to form social societies: trade-unions, cooperative societies, youth organizations, cultural, technical and scientific societies, and the most active and conscious citizens from the ranks of the